No. 93-5770

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

ROBERT EDWARD STANSBURY,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF CALIFORNIA

RESPONDENT'S BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether the state court's finding that petitioner was not in custody was supported by the record where he voluntarily went to the police station for questioning, was told only that he was a potential witness, and was free to leave at any time?

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STATEMENT OF THE CASE

On November 23, 1982, the Los Angeles County District Attorney filed an information charging petitioner with the first degree murder (Cal. Penal Code § 187)[1] of ten-year old Robyn Jackson; lewd acts on a child under

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1. Unless otherwise indicated, all statutory references are to the California Penal Code.

the age of 14 (§ 288(b)); rape (§ 261(2)); and kidnapping (§ 207). The information alleged special circumstances that the murder was committed in the commission of kidnapping (§ 190.2(a)(17)(ii)); in the commission of a rape (§ 190.2(a)(17)(iii)); and in the commission of a lewd and lascivious act upon a child under the age of 14 years (§ 190.2(a)(17)(v)). The information further alleged that petitioner inflicted great bodily injury in connection with the noncapital offenses (§§ 1203.075, 12022.7, 12022.8) and that petitioner committed the offenses while on parole for rape and lewd acts upon a child under the age of 14 years (§§ 1203.085(a), 3000). CT 1-5; J.A. 1, 438.

On April 30, 1984, petitioner moved to suppress statements made to the police before his arrest. J.A. 1, 5-13. On June 25, 1984, the prosecution filed its opposition to petitioner's motion. J.A. 1, 14-20.

On October 30, 1984, the state trial court commenced a hearing on petitioner's suppression motion. J.A. 1, 21. On November 5, 1984, the state trial court granted in part and denied in part petitioner's suppression motion. J.A. 1, 432-33, 435-37.

On May 22, 1985, the jury found petitioner guilty of all charges and found the enhancements and special circumstances to be true. J.A. 1, 438.

On May 31, 1985, the same jury returned a sentence of death. J.A. 1, 438. The state trial court entered its judgment of death on July 15, 1985. J.A. 1.

Petitioner's appeal to the California Supreme Court was automatic. J.A. 438. On March 8, 1993, the California Supreme Court issued its opinion affirming the judgment in its entirety. J.A. 438-511, 514. Following a minor modification of the opinion, the California Supreme

Court denied a petition for rehearing on May 26, 1993. J.A. 512-13.

On August 24, 1993, petitioner filed a petition for writ of certiorari. On November 1, 1993, this Court granted the writ, limited to Question 3 of the petition.

STATEMENT OF FACTS

A. The Underlying Offense

On September 28, 1982, petitioner drove his white ice cream truck through the Baldwin Park neighborhood of Los Angeles. At approximately 4:45 p.m., a competitor saw petitioner driving his truck; the truck functioned normally. RT 10711, 10715. At 5:00 p.m., petitioner drove the rear of his truck into a chain link fence. RT 7589-90, 10689. The property owner summoned the police. The owner gave the police petitioner's name and driver's license number. RT 10696. Petitioner agreed to repair the minimal damage to the fence. RT 10697. The property owner discerned no mechanical difficulties to petitioner's truck. RT 7595.

At approximately 6:00 p.m., ten year old Robyn Jackson obtained her mother's permission to play in the schoolyard on her street. RT 7577-78. Robyn's mother told her to return home before dark. RT 7578.

A neighbor saw a white ice cream truck near the school at about 6:00 p.m. This neighbor's son saw Robyn talking to the red haired, bearded ice cream truck driver who wore glasses.[2/] RT 7520-21, 7625, 7632-35. The next time the boy looked toward the schoolyard, Robyn had disappeared; the ice cream truck made an uncharacteristic U-turn and drove away from the area. RT 7522-23. Normally, the ice cream truck proceeded all the way down

2. Petitioner had red hair, a beard, and wore glasses at the time of the incident. RT 7536, 7596, 8128-29, 8202-04.

the street. RT 7522-23.

Petitioner over time established a unique relationship with ten-year old Robyn by giving her free candy and ice cream. Petitioner did not give gifts to the other neighborhood children. RT 7533, 7636, 7652.

Petitioner did not return to his residence until after 9:00 p.m. RT 8402. At about midnight, petitioner borrowed his roommate's turquoise automobile, stating that he wanted to get something to eat. RT 7248-52, 10145. Petitioner parked the automobile next to the ice cream truck; the car remained in the driveway a few minutes before petitioner left. RT 7252-53, 10152-53, 10424-33. Petitioner did not return until approximately 3:00 a.m. RT 7192-93.

At approximately 1:15 a.m., Andrew Zimmerman saw the turquoise automobile in Pasadena. RT 6976, 6999. Zimmerman observed a large man get out of this car and dump something into a flood control channel. RT 6979, 6987.

Zimmerman looked into the flood channel and observed a body. He then telephoned the police. RT 6977. At approximately 1:30 a.m., the police discovered Robyn Jackson's dead body in the flood control channel. The child was naked and had fresh blood in her vaginal area. RT 7130, 7510-11.

Before her death, the child had been placed in a cold, oxygen-deprived environment, such as an ice cream freezer. RT 7306, 7461-65. There was evidence of saliva deposited by a nonsecretor on the victim's genital area and right nipple. RT 7350, 7361-62, 7387-88. The victim was a secretor; petitioner, like only 20 percent of the population, was a nonsecretor. RT 7365-60, 7390. Robyn

suffered bruises to her face and chin as well as scratches to the right side of her face. The child died at approximately 1:30 a.m. when her head struck the concrete floor of the flood control channel. RT 7416, 7434, 7437-38.

At the penalty phase, the prosecution presented evidence of other crimes committed by petitioner. At the age of 20, petitioner violently assaulted and sexually abused two boys, then ages 10 and 9. RT 11805, 11820-21. He threatened to kill the boys, and forced one to dig a grave. RT 11808-09, 11819-20. Petitioner was convicted of lewd conduct with children for these activities. RT 11805, 11808. Petitioner served a five-year, two month term of imprisonment for these crimes. RT 11805, 11869.

Less than two years after his release from prison, petitioner kidnapped, raped, robbed and threatened to kill a 21-year old woman. RT 11806, 11857-58. Petitioner was imprisoned for slightly over two years for these offenses. RT 11806-07, 11860.

About a year after his release, petitioner, while armed, raped a 14-year old girl. RT 11807. Within four days, petitioner, while armed with a firearm, kidnapped a 21-year old woman. RT 11807. Petitioner served a prison term of approximately six years for these offenses. RT 11807. Petitioner was on parole when he committed the crimes against Robyn Jackson. RT 11807, 11870.

B. The Murder Investigation

On September 29, 1982, Lieutenant Johnston, a Los Angeles County Sheriff's investigator, was assigned to

the Robyn Jackson homicide. J.A. 67. Johnston interviewed a witness who saw the driver of a turquoise automobile dump the child's body in the flood control canal. J.A. 68-69. The witness described the driver as a "big man." J.A. 94. The turquoise car provided the only solid link to the murder. J.A. 68, 93.

Johnston was attempting to locate all possible witnesses to the kidnapping, and to that end learned from a Baldwin Park police officer that petitioner had been involved in a traffic accident in the area where the child disappeared. J.A. 69. Johnston had information that two ice cream trucks had been in the Baldwin Park area. J.A. 99-100. A child witness told Johnston that he saw Robyn near a blue ice cream truck operated by a Black man just before her disappearance.[3] J.A. 145-46. Johnston contacted Yusuf Nyanganira[4] to interview him about his knowledge of the case. J.A. 70.

Johnston asked undercover Baldwin Park police officers to contact petitioner for an interview as a possible

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3. Petitioner emphasizes that the police had information that the victim was seen with him near the time of her disappearance. But Johnston testified that Donald Helmer gave information to the police that the victim was seen talking to a Black male in a blue ice cream truck at about five o'clock on the evening of her disappearance. RT 2126-28, 2148. Jeremy Ramos, a five year old, initially told the police that he last saw the victim talking to a Black male in a blue ice cream truck. RT 2128-29, 2148, 2171. Jeremy Ramos also indicated that he saw Robyn talking to an individual matching petitioner's description before dinner. RT 2148. The police interviewed Ramos after Sharon Sanchez gave them information originating with Ramos. J.A. 145.

4. Petitioner's truck was white; petitioner is Caucasian. Yusuf was Black and drove a blue ice cream truck. J.A. 146, 148.

witness; Johnston never indicated or even intimated that petitioner was a suspect. J.A. 31-32, 72, 207-08, 239. Petitioner was not to be detained or arrested. J.A. 72. Johnston wanted to talk to petitioner because petitioner was in the vicinity of the kidnapping, not because he was a suspect. J.A. 152. No homicide investigator went to petitioner's residence. J.A. 34. If petitioner had been a suspect, a homicide investigator would have been dispatched to assist in his apprehension. J.A. 72. Neither Johnston nor the other officers had information about petitioner's criminal history or prior convictions.[5] J.A. 35, 87.

After petitioner arrived at the Pomona police station, Johnston and Baldwin Park Police Officer Bell spoke with petitioner in an interview room.[6] Johnston had never conducted interviews at the Pomona police station.[7] J.A. 108.

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5. Johnston requested criminal histories on "a number of people," including petitioner. J.A. 107. He received information indicating that petitioner did not have prior convictions. J.A. 108.

6. Officer Bell was an observer only and not a member of the homicide investigation team. J.A. 227-29. Only after suspicion had focused on petitioner did Johnston summon the other two homicide investigators. J.A. 157-58.

7. Yusef was interviewed upstairs while petitioner's interview took place on the ground floor near the jail facility. Johnston testified that the investigators' use of an upstairs interview room was inconvenient.

> "It caused quite a bit of difficulty because there is nobody upstairs in the Pomona police department after five o'clock at night.
>
> "So there was some difficulty in accessing a key, getting permission. One of the reasons we had only just begun interviewing Yusef when we were advised Mr. Stansbury was downstairs was the delay in getting permission to go upstairs, finding a key to go upstairs and it seemed more considerate of Mr. Stansbury to come to him than to move him around the facility anymore." J.A. 110.

Johnston testified that petitioner was not in custody or in any way restrained. J.A. 74. Johnston did not consider petitioner a suspect and would have permitted petitioner to leave.[8] J.A. 74, 153. Johnston showed a photograph of Robyn Jackson to petitioner during the interview. Johnston used the photograph to explore "the possibility of him having seen her coming from or going to any particular location or persons or vehicles or whereabouts at a time that might be pertinent to this investigation." J.A. 81. The conversation regarding petitioner's activities was casual. J.A. 121. Lieutenant Johnson believed petitioner's statements until he described the turquoise automobile. J.A. 123, 132, 137.

C. Petitioner's Interview

Petitioner lived in a Pomona trailer park. J.A. 32. Four Baldwin Park undercover police officers went to petitioner's residence at approximately 11:00 p.m. on September 29, 1982. J.A. 30-31, 42, 205-09. Officer Lee knocked on petitioner's door; the other officers were behind or to the side of Lee. J.A. 35, 207. When petitioner answered the door, Lee identified himself as a

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8. Officer Bell also testified that she would have permitted petitioner to leave. J.A. 245.

police officer. J.A. 36. Lee requested that petitioner accompany him to the Pomona police department for an interview.[9/] Lee specifically told petitioner that the homicide detectives wanted to speak with him as a "possible witness."[10/] J.A. 36. Lee indicated that petitioner could drive himself or they could provide transportation if petitioner had no means of getting to the police station on his own. J.A. 36-37. Petitioner agreed to the interview, stating that he had no transportation.[11/] J.A. 37, 57.

Officer Lee drove petitioner to the Pomona police station. Petitioner sat in the front passenger seat of the unmarked police car. J.A. 37-38. Petitioner was not handcuffed. See J.A. 422. Lee did not question petitioner about the homicide. J.A. 39. Petitioner was very cooperative; he never voiced any concern or indicated any hesitation in accompanying the officers. J.A. 57, 66.

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9. Petitioner emphasizes that the police officers were armed when they contacted him. But two officers were located at the end of the trailer and the location of Lee's gun prevented petitioner's view of the weapon. J.A. 65-66. Furthermore, the officers holstered their weapons when petitioner exited the trailer. J.A. 57. None of the officers pointed a gun a petitioner. J.A. 65, 210.

10. Officer Lee testified, "I told him I was there in reference to a homicide investigation, that he was a possible witness, and that the homicide detectives were at the Pomona police department, and if he would accompany me to the Pomona police department." J.A. 36.

11. Petitioner states that "[n]o witness testified that petitioner was offered any choice whether to go to the police station." Brief of Pet. at 6. Officer Lee testified, "I *asked* him *if* he would accompany me to the Pomona Police Department . . . ." J.A. 56 [emphasis added.] This terminology certainly indicates that petitioner was given a choice. Officer Lee described petitioner as "very cooperative." J.A. 58.

Lee and the other officers entered the Pomona police station through the sally port. J.A. 40. A local police officer directed them to an interview room on the ground floor. J.A. 62. The officers then accompanied petitioner to this interview room. J.A. 40. Lee went upstairs to notify Lieutenant Johnston that petitioner was in an interview room. J.A. 40, 73.

Lieutenant Johnston met petitioner in the interview room. Baldwin Park Police Officer Darlene Bell was present for the interview. J.A. 73-74. Petitioner was not handcuffed or physically restrained. J.A. 73. The interview was not tape recorded. J.A. 234. The interview room was located near the booking area of the Pomona jail. J.A. 108. The room contained a table and three or four chairs. J.A. 115. Lieutenant Johnston did not recall if the door was closed during the interview and did not know if the door locked. J.A. 116. The interview room was in a secured area.[12/] J.A. 260.

Lieutenant Johnston told petitioner that he wanted to question him as a potential witness. J.A. 248, 258. Johnston did not inform petitioner of his *Miranda* rights. J.A. 74. Johnston asked petitioner about his

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12. Petitioner states that this interview room was "normally" used for questioning suspects and individuals in custody. Brief of Pet. at 7. The standard practice for local officers was irrelevant because nothing in the record establishes that a reasonable person in petitioner's position would be aware of the normal use of the interview rooms. Furthermore, the only witness who testified about the normal use of the interview room also testified that the upstairs interview rooms were normally locked at night and that the officers from another station would normally take a citizen informant to the sally port area. J. A. 408. Lieutenant Johnston testified that any movement beyond the public lobby "required passage by some means through some type of security door." J.A. 311.

activities on the day Robyn Jackson was abducted. J.A. 75. Petitioner provided a narrative of his activities on the date in question; he answered questions clarifying his responses. J.A. 118, 249. Petitioner answered Johnston's questions regarding other persons in the area.[13] Petitioner recognized Robyn's photograph; petitioner acknowledged that he saw the child on the evening she was abducted. J.A. 83, 85.

Toward the end of the interview, Johnston asked petitioner to describe the automobiles to which he had access. J.A. 87. When petitioner described the turquoise automobile he borrowed the morning that Robyn's body was thrown into the flood control canal, Johnston asked petitioner if he had any prior arrests. J.A. 87. Petitioner informed Johnston that he had prior convictions for rape and kidnapping and two prior convictions for child molestation. Petitioner also told Johnston he was on parole. J.A. 88. Johnston then stopped the interview. The interview lasted twenty to thirty minutes. J.A. 232, 264. Petitioner stated, "I guess that makes me a good suspect." J.A. 89. During the interview, petitioner never appeared reluctant to respond to questioning. J.A. 75. He never asked to leave or to terminate the interview. J.A. 75.

Johnston left the interview room and returned with the two other homicide investigators. J.A. 90. One of the other investigators read petitioner his *Miranda* rights. J.A. 91. Petitioner asked to speak with an attorney; the police did not question him any further. J.A.

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13. Petitioner told Lieutenant Johnston that he saw a male Caucasian drive a white ice cream truck near the school. J.A. 85-86.

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SUMMARY OF ARGUMENT

Miranda safeguards apply only where an individual is formally arrested or suffers restraint equivalent to formal arrest. The totality of the circumstances should dictate custodial status, looking to the view of the reasonable person in the interviewee's position.

A determination of custodial status for *Miranda* purposes should look to the nature of the initial encounter with the police, the circumstances of any transportation and, most significantly, the circumstances of the interrogation itself. The latter inquiry should incorporate relevant criteria, such as the location of the interview, the nature of the questioning, the extent to which the police confront the individual with evidence of guilt, the duration of the interview, and the degree of pressure exerted to detain the individual.

Application of these principles establishes that petitioner was not in custody when he was interviewed at the police station. Petitioner voluntarily agreed to give the interview and to accompany the police to the station house. The police invited rather than commanded petitioner's presence. These factors, viewed objectively from an interviewee's perspective, argue in favor of a noncustodial setting. Petitioner's consent was not vitiated by the proximity of the interview room to the local jail. The police did not use any restraints on petitioner. The police never confronted petitioner with any evidence of his guilt. To the contrary, they told him that they considered him a witness. The police exerted no pressure to compel petitioner to stay. He never expressed any unwillingness

to be questioned and never asked to leave. The interview only lasted approximately 25 minutes. In light of these objective factors, the state courts' conclusion that petitioner was not in custody is fully justified.

ARGUMENT

PETITIONER WAS NOT IN CUSTODY WHEN POLICE QUESTIONED HIM

Petitioner argues that statements which he made to police at the Pomona police station on the evening of September 29, 1982, were inadmissible because although they were elicited during custodial interrogation, he had not been advised of his constitutional rights as required by *Miranda v. Arizona*, 384 U.S. 436 (1966). The state courts rejected his contention, finding that he was not in custody during questioning, a prerequisite to giving *Miranda* warnings. Petitioner disputes this finding, arguing that the facts established that he was in custody as a matter of law and that the state courts applied an erroneous standard in ruling to the contrary.

For reasons which follow, respondent submits that the record before this Court fully supports the conclusion that petitioner was not in custody when he made the challenged statements. Respondent will identify the criteria, gleaned from this Court's decisions, which determine whether a station house questioning is custodial interrogation, and will demonstrate that petitioner was not in custody, and thus not subject to the coercive forces inherent in a police-dominated atmosphere, when he gave his incriminating statements.

A. General Principles

Miranda v. Arizona, *supra*, held "that the Fifth

Amendment privilege against self-incrimination prohibits admitting statements given by a suspect during 'custodial interrogation' without a prior warning." *Illinois v. Perkins*, 496 U.S. 292, 296 (1990). But only police custodial interrogation triggers the protections of *Miranda*. *Ibid.* Custody without interrogation does not implicate *Miranda's* concerns. See *Arizona v. Mauro*, 481 U.S. 520, 527 (1987); *Rhode Island v. Innis*, 446 U.S. 291, 298 (1980). Nor does interrogation without custody require the observance of *Miranda*. *California v. Beheler*, 463 U.S. 1121 (1983); *Oregon v. Mathiason*, 429 U.S. 492 (1977) (per curiam). Moreover, there must be a nexus -- an "interaction" -- between police interrogation and police custody. *Illinois v. Perkins*, *supra*, 496 U.S. at 297.

Miranda posits that custodial interrogation creates a presumption of compulsion. *Oregon v. Elstad*, 470 U.S. 298, 307 (1985). This rule is in turn based upon two propositions. First, informal pressure to speak -- pressure not backed by legal process or formal sanction -- can constitute compulsion under the Fifth Amendment. Second, informal compulsion is present in any questioning of a suspect in custody. Schulhofer, Reconsidering *Miranda*, 34 U.Chi.L.Rev. 435, 436 (1987). Consequently, the Court required clear warnings which dispelled the coercive atmosphere of custodial interrogation by giving the suspect the power to exert some control over the course of the interrogation. *Moran v. Burbine*, 475 U.S. 412, 426-27 (1986).

The terms "custody" and "interrogation" have precise meanings. Interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police

should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island v. Innis*, *supra*, 446 U.S. at 301; *Arizona v. Mauro*, *supra*, 481 U.S. at 526-27. Regarding custody, this Court has held that a detention under *Terry v. Ohio*, 392 U.S. 1 (1968), is insufficient to establish that element. *Berkemer v. McCarty*, 468 U.S. 420 (1984). Rather, "the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *California v. Beheler*, *supra*, 463 U.S. at 1125.

It is evident why both elements are necessary to establish coercion. If a reasonable person in the suspect's position did not know that the officer's words or conduct called for a response, he would feel no compulsion to answer. *Rhode Island v. Innis*, *supra*, 446 U.S., at 301-02. On the other side of the coin, if a reasonable person in the suspect's position knows that he is free to end the meeting and hence terminate the questioning, he is not susceptible to the "pressure on a suspect who is painfully aware that the literally cannot escape a persistent custodial interrogation." *Minnesota v. Murphy*, 465 U.S. 420, 433 (1984).

B. Custody

This case is about custody. If petitioner was in custody, the officers' failure to advise petitioner of his rights renders his statements inadmissible under *Miranda*. If he was not in custody, the statements were properly admitted in evidence. Respondent will survey this Court's

cases which define custody, discuss the factors identified by the lower courts as relevant to the issue of custody, address the criteria presented by petitioner, and suggest a workable framework for determining whether the subject of police station questioning is in custody within the meaning of *Miranda*.

1. This Court's Decisions

This Court began to shape the contours of custody in *Miranda* itself, when it defined custodial interrogation as "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any way." *Miranda v. Arizona*, *supra*, 384 U.S. at 444. The *Miranda* Court then noted, "This is what we meant in *Escobedo* when we spoke of an investigation which had focused on an accused." *Id.*, at 444, n. 4. (citing *Escobedo v. Illinois*, 378 U.S. 478 (1964)).

In *Beckwith v. United States*, 425 U.S. 341 (1976), this Court repudiated the notion that the focus of suspicion translated into custody. "Although the 'focus' of an investigation may indeed have been on Beckwith at the time of the interview in the sense that it was his tax liability which was under scrutiny, he hardly found himself in the custodial situation described by the *Miranda* Court as the basis for its holding." *Id.*, at 347.

In *Oregon v. Mathiason*, *supra*, 429 U.S. 492, the Court reiterated that *Miranda* warnings are not required simply because the questioned person is one whom the police suspect. "*Miranda* warnings are required only

where there has been such a restriction on a person's freedom as to render him 'in custody.' It was that sort of coercive environment to which *Miranda* by its terms was made applicable, and to which it is limited." *Id.*, at 495. In the context of the present case, it is significant that the questioning of the defendant in *Mathiason* was conducted in the police station to which he had come voluntarily. *Mathiason* established that interrogation at the station house is not necessarily custodial.

In *California v. Beheler*, *supra*, 463 U.S. 1121, also involving station house questioning, this Court reaffirmed its earlier holdings that custody is not established merely because an individual is the focus of a criminal investigation. "Our holding in *Mathiason* reflected our earlier decision in *Beckwith v. United States*, 425 U.S. 341 (1976), in which we rejected the notion that the 'in custody' requirement was satisfied merely because the police interviewed a person who was the 'focus' of a criminal investigation." *California v. Beheler*, 463 U.S. at 1124, n. 2. "Although the circumstances of each case must certainly influence a determination of whether a suspect is in custody for purposes of receiving *Miranda* protection, the ultimate inquiry is simply whether there is a 'formal arrest or restraint on freedom of movement' of the degree associated with a formal arrest." *Id.* at 1125.

In *Minnesota v. Murphy*, *supra*, 465 U.S. 420, this Court again repudiated a necessary connection between focus of suspicion and custody. "The mere fact that an investigation has focused on a suspect does not trigger the need for *Miranda* warnings in noncustodial settings, *Beckwith v. United States*, 425 U.S. 341 (1976), and the probation officer's knowledge and intent have no bearing

on the outcome of this case." *Minnesota v. Murphy*, *supra*, 465 U.S. at 431.

In *Berkemer v. McCarty*, *supra*, 468 U.S. 420, this Court explicitly rejected a subjective test for determining custody. "A policeman's unarticulated plan has no bearing on the question whether a suspect was 'in custody' at a particular time; the only relevant inquiry is how a reasonable may in the suspect's position would have understood his situation." *Id.*, at 441-42. *Berkemer* is also significant because it held that *Miranda* is inapplicable to traffic stops and *Terry*-type detentions. *Terry v. Ohio*, *supra*, 392 U.S. 1. This Court stated:

> "The comparatively nonthreatening character of detentions of this sort explains the absence of any suggestion in our opinions that *Terry* stops are subject to the dictates of *Miranda*. The similarly noncoercive aspect of ordinary traffic stops prompts us to hold that persons temporarily detained pursuant to such stops are not 'in custody' for the purposes of *Miranda*." *Berkemer*, 468 U.S. at 440.

"The task of defining 'custody' is a slippery one." *Oregon v. Elstad*, *supra*, 470 U.S. at 309. However, certain basic principles may be distilled from this Court's "custody" decisions. First and foremost, custody is the functional equivalent of arrest in terms of the restrictions imposed upon the suspect's freedom of movement. Second, because not all arrests are custodial, a traffic stop, while technically an arrest, does not trigger the protections of *Miranda*. Third, for much the same reason, a *Terry* stop is not custody for purposes of *Miranda*, although the citizen is forcibly restrained during the course of the interview with the officer. Fourth, an objective standard

is used to determine whether a suspect is in custody, *i.e.*, how a reasonable person would have understood the situation. An officer's uncommunicated knowledge or intent is irrelevant to the issue of custody; it may become relevant if that knowledge or intent is communicated to the suspect. Fifth, questioning at a police station is not custodial *per se*; it is merely one circumstance to be considered in determining the suspect's status.

2. Factors Relevant To Custody

This Court's broad guidance on the issue of custody has led lower federal and state courts to develop more specific criteria. The California Supreme Court has stated, "the most important considerations include (1) the site of the interrogation, (2) whether the investigation has focused on the subject, (3) whether the objective indicia of arrest are present, and (4) the length and form of questioning." J.A. 471; *People v. Stansbury*, 4 Cal.4th 1017, 1050; 17 Cal.Rptr.2d 174, 193; 846 P.2d 756, 775, *cert. granted*, 114 S.Ct. 380-81 (1993). Intermediate California courts of appeal have also relied upon (5) the ratio of officers to suspects and (6) the nature of the questioning. *People v. Bellomo*, 10 Cal.App.4th 195, 199, 10 Cal.Rptr.2d 782, 784 (1992); *People v. Lopez*, 163 Cal.App.3d 602, 606, 209 Cal.Rptr. 575, 577 (1985).

Petitioner asserts that it is irrelevant whether the investigation has focused upon the suspect because that factor, involving the knowledge and intent of the investigating officers, is inconsistent with the objective standard of custody. Petitioner paints with too broad a

brush. This Court has never held that focus is irrelevant *per se*; rather, the officers's knowledge and intent have no bearing on the question of custody only if they were uncommunicated to the suspect. *Berkemer v. McCarty*, *supra*, 468 U.S. at 442; *cf. Michigan v. Chesternut*, 486 U.S. 567, 575 n. 7 (1988). Thus, one California court has sensibly held that "the focus of official investigation is irrelevant to custody unless it is somehow communicated to the defendant. Accusatory questioning is one obvious way of making manifest the investigation's focus." *People v. Bellomo*, *supra*, 10 Cal.App.4th at 200; 10 Cal.Rptr.2d at 785. Thus, factor (2) is subsumed by factor (4), the form of questioning.

The Ninth Circuit has developed a five-part test which largely overlaps the California criteria: (1) the officer's language in summoning the person interviewed; (2) the place where the interrogation occurred; (3) the degree of pressure applied to detain the suspect; (4) the duration of the detention; and (5) the extent to which the person was confronted with evidence of guilt. *United States v. Hudgens*, 798 F.2d 1234, 1236 (9th Cir. 1986); *United States v. Booth*, 669 F.2d 1231, 1235 (9th Cir. 1981). The First Circuit considers "whether the suspect was questioned in familiar or at least neutral surroundings, the number of law enforcement officers present at the scene, the degree of physical restraint placed upon the suspect, and the duration and character of the interrogation." *United States v. Streifel*, 781 F.2d 953, 961, n. 13 (1st Cir. 1986); *see United States v. Masse*, 816 F.2d 805, 809 (1st Cir. 1987). These factors closely resemble the criteria identified in *Booth*.

Based upon this Court's decisions on the

question of custody, and the lower courts' attempts to explicate them, it is possible to formulate some general guidelines. Relevant to the issue of custody are : (1) the circumstances of the initial encounter between the suspect and police; (2) the circumstances of the transportation, if any, of the suspect to the place of interrogation; and (3) the circumstances of the interrogation itself.

The first factor should be informed by this Court's Fourth Amendment jurisprudence. Thus, a court of review should determine initially whether the suspect was arrested, detained, or consented to the encounter with the police. *See Florida v. Royer*, 460 U.S. 491, 497-501 (1983). This proposition is no more than an acknowledgement that many cases which analyze the level of coercion of the initial (or pre-interrogation) encounter focus upon factors typically associated with the issue of whether a person has been seized under the Fourth Amendment. Thus, the place of the encounter, the number of officers, the language used, and the presence of weapons all have been factors upon which courts have relied in both detention cases under the Fourth Amendment and custody cases under the Fifth Amendment. *Compare Berkemer v. McCarty*, *supra*, with *Florida v. Bostick*, ___U. S.___, 111 S.Ct. 2382, 115 L.Ed.2d 389 (1991). The common relevance of these factors should be apparent: the less restraint upon the citizen (Fourth Amendment), the less coercion to speak (Fifth Amendment). *See Berkemer v. McCarty*, *supra*, 468 U.S. at 440.

Second, the transportation of the suspect to the place of interrogation is relevant to the nature of the continuing encounter. If a person has agreed to

cooperate with police and knows that he is free to leave, *United States v. Mendenhall*, 446 U.S. 544 (1980), his decision to go with police to the station house may also be voluntary. That is a discrete issue to be determined by the totality of circumstances. *Id.*, at 557. But a person who is forcibly detained on the street, although initially subject to questioning without the rendition of *Miranda* admonitions, cannot be taken to the police station without probable cause to arrest him. See *Dunaway v. New York*, 442 U.S. 200, 206-16 (1979). Thus, a reasonable person who has been involuntarily taken to, or detained at, a police station for questioning would believe that he was under arrest. Such a person is in custody under *Miranda*.

Third, the circumstances of the questioning are obviously of transcendent importance. To be considered are, for example, the place of the interrogation; the length of the questioning; the nature of the questions, whether neutral or accusatory; the use of coercive tactics, such as threats or promises, which may implicate the Due Process Clause; and any advice by police that the citizen is free to leave at any time. This list is hardly exhaustive, but it is intended to identify some of the factors which would lead a reasonable person to believe that he is in custody.

3. Petitioner's Suggested Criteria For Custody

Relying largely upon *United States v. Griffin*, 922 F.2d 1343 (8th Cir. 1990), petitioner suggests the following "nonexhaustive" list of factors are relevant to determining whether the suspect was in custody during interrogation:

(1) whether the suspect was informed at the time of

questioning that the questioning was voluntary, that the suspect was free to leave or [to] request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive stratagems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or, (6) whether the suspect was placed under arrest at the termination of the questioning. 922 F.2d at 1349; Brief for Pet. at 19.

Respondent does not necessarily dispute the relevance of many of these factors, but does question their importance. First, this Court has never held that police must advise persons not in custody of their legal rights. *United States v. Mendenhall*, *supra*, 446 U.S. at 555; *Schneckloth v. Bustamonte*, 412 U.S. 218, 234 (1973). The rendition by police of a "pre-*Miranda*" litany to every person whom they interview seems unduly burdensome.

Second, the concept of "unrestrained" freedom of movement is puzzling. Often a person's movement is restrained by circumstances having little or nothing to do with the presence of police. *See Florida v. Bostick*, *supra*. Furthermore, a *Terry* detainee is restrained but not in custody within the meaning of *Miranda*. Finally, this factor has little application to the typical situation which involves slight or varying degrees of restraint.

Third, whether a suspect initiated contact with police or voluntarily responded to questions seems both

fortuitous and irrelevant. By hypothesis, the suspect acted voluntarily in both situations. Later events have no bearing upon his initial decision to cooperate. Those subsequent events must be viewed alone to determine the issue of custody.

Fourth, although strong arm tactics may be relevant to the existence of custody, "deceptive stratagems" are not. "Whatever relevance this fact may have to other issues in the case, it has nothing to do with whether respondent was in custody for purposes of the *Miranda* rule." *Oregon v. Mathiason*, *supra*, 429 U.S. at 495-96; *see also*, *Illinois v. Perkins*, *supra*, 496 U.S. at 297.

Fifth, police domination of the atmosphere of the questioning, involving the place, form, and length of the interrogation, is concededly relevant. Nevertheless, as *Mathiason* and *Beheler* teach, the fact that the questioning took place in a station house is not dispositive of the custody issue.

Finally, the relevance that the suspect was arrested following interrogation is not readily apparent. The ultimate result of the interrogation cannot dictate the custodial status of the individual at an earlier point in time. Events which occur after the interrogation cannot affect a reasonable person's view of his custodial status. In the absence of some statement by the police indicating to the individual who is the subject of the interrogation that he will be released or arrested at the termination of the interview, the time lapse between the interrogation and the arrest is irrelevant. To hold otherwise is to encourage the police to release individuals temporarily and then arrest them at some later date based on the information obtained from the interview.

4. Station House Questioning

This case involves the questioning of a suspect at the station house, to which he was transported. As indicated in section (2), such a factual scenario actually raises three issues. Petitioner has merged, and thereby blurred, these issues to achieve his desired objective, but his analytical framework is consequently flawed. The issues which a reviewing court must serially decide are, first, whether the suspect was detained or arrested when he was taken to the police station. If he was, then he was in custody and no further inquiry is necessary. If he was not, and instead consented to the initial encounter, the second question is whether he voluntarily consented to accompany the police to the station house. *See United States v. Mendenhall*, *supra*, 446 U.S. at 557. Again, if his consent was involuntary, he was in custody and his unwarned statements must be suppressed. If his consent to go to the station was valid, the court must make a third inquiry: under all the circumstances of the interrogation, would a reasonable person have believed that he was free to terminate it and leave the station? If the suspect's presence in the stationhouse is consensual, the preceding events -- *i.e.*, the consensual encounters and transportation -- play no part in the determination whether the interrogation at the police station is custodial. Respondent addresses these issues in the context of this case in part C, *infra*.

C. Petitioner Was Not In Custody

Petitioner maintains that the California courts incorrectly found that he was not in custody because they applied an erroneous standard. Specifically, he contends that their finding was tainted by their intermediate determination that petitioner was not the focus of the investigation. He argues that the interrogating officer's intent and suspicions were irrelevant to the issue of custody because they were not communicated to him. Accordingly, he submits, the judgment must be reversed.

Respondent acknowledges the California Supreme Court relied in part upon the lack of focus on petitioner as relevant to the issue of custody (J.A. 473-75; 4 Cal. 4th at 1052, 17 Cal.Rptr.2d at 194, 846 P.2d at 776-77), although it shall be noted that most of the factors which it considered -- site of the interrogation, indicia of arrest, length and form of questioning -- are objective. J.A. 475; 4 Cal.4th at 1053-54, 17 Cal.Rptr.2d at 195, 846 P.2d at 777. However, the standard employed by the state courts is really beside the point. Custody is determined by applying objective criteria to the facts as found by the trial court. Therefore, this Court may and should decide whether petitioner was in custody. State courts are in no better position to resolve this essentially legal issue. If the Court does address this question, the state courts' resolution, and the criteria they applied, are irrelevant.

For the reasons which follow, respondent submits that petitioner was not in custody on the evening of September 29, 1982. His initial meeting with police was a consensual encounter, not an arrest or detention; he

voluntarily consented to be taken to the Pomona police station for questioning; and during the questioning a reasonable person would not have believed that he or she would be prevented from leaving if a request had been made.

1. Consensual Encounter

The language employed by the police to summon the individual to an interview set the tone of the meeting. Here, the initial encounter between the police and petitioner took place at his residence. The police knocked on petitioner's door at approximately 11:00 p.m. on the evening of the child's death.[14] Officer Lee spoke with petitioner; three other officers were present outside the residence. While all the officers were armed, Officer Lee deliberately placed his gun where petitioner could not see it. J.A. 65-66. The evidence adduced at the suppression hearing did not establish that petitioner saw the guns in the remaining police officers' hands. J.A. 476. In any event, the police officers never pointed their weapons at petitioner and holstered them when petitioner stepped

14. While the officers went to petitioner's residence late at night, petitioner's characterization of the time frame as "in the middle of the night" Brief of Pet. at 26, is misleading.

Detective Johnston testified that time is critical in a homicide investigation. J.A. 147. Johnston further testified that because petitioner sold ice cream from a moving vehicle, he had no business address. The nature of petitioner's employment made contacting him during the day problematic. J.A. 147-48.

outside the trailer.[15] J.A. 57. *See Florida v. Bostick, supra.*

Officer Lee explained to petitioner that the homicide detectives were at the Pomona police station; they wanted to interview him as a *witness* to a homicide. J.A. 36, 56. This language suggested that petitioner was not a suspect and that his voluntary cooperation could assist the police in their investigation. Police officers may request assistance from the citizenry where, as here, the individual is free to disregard the request. *See United States v. Mendenhall, supra,* 446 U.S. at 554. Officer Lee asked petitioner *if* he would go to the Pomona police station for an interview. J.A. 56. The conditional language employed by Officer Lee clearly indicated that petitioner had a choice. A reasonable person under the circumstances would deem the request for a witness interview to be a genuine request rather than ordered restraint.

Miranda distinguishes between police questioning of individuals in custody and citizen witnesses.

> "General on-the-scene questioning as to facts surrounding a crime or other general questioning of citizens in the fact-finding process is not affected by our holding. It is an act of responsible citizenship for individuals to give whatever information they may have to aid in law enforcement. In such situations, the compelling atmosphere inherent in the process of in-custody interrogation is not necessarily present." 384 U.S at 477-78.

15. Contrary to petitioner's assertion, the record fails to establish a "display of force" by the police officers. *Bostick, supra.*

A reasonable person would also distinguish between questioning of witnesses and custodial interrogation.

Petitioner was very cooperative with the police and readily agreed to an interview. J.A. 58. The police did not threaten or coerce petitioner before he agreed to the interview. Therefore, the initial communication between petitioner and police was consensual because a reasonable person in his position would have realized that he was free to terminate the interview.

2. Transportation

Petitioner voluntarily agreed to the requested interview at the police station. The language used by the police did not suggest that petitioner's acquiescence was compelled. After petitioner consented to the interview, Officer Lee asked petitioner if he needed transportation to the station.[16/] J.A. 36-37. Lee afforded petitioner the opportunity to drive himself to the station. J.A. 37. Petitioner stated that he did not have any transportation. J.A. 37. Officer Lee then drove petitioner to the Pomona police station. Petitioner was seated in the front passenger seat of an unmarked police car. He was not

16. Petitioner claims that even though he was given the option of driving himself to the police station, "there is no evidence that the police intended to allow petitioner to drive himself anywhere unescorted." Brief of Pet. at 24, n. 12. As petitioner himself argues, the police officers' undisclosed intent is irrelevant. Officer Lee stated that petitioner could drive himself to the station. This statement is not fairly susceptible to the interpretation that the police would ensure petitioner's presence by forcibly escorting him there.

handcuffed. J.A. 37-38, 73, 422. He never objected to the ride or indicated that he was compelled to accept Officer Lee's offer of transportation. This method of transportation was not suggestive of an involuntary detention.

The California Supreme Court properly concluded that petitioner's transportation to the police station was not acquiescence to a display of authority.

> "They [the police] solicited his voluntary cooperation, asked if he wanted to drive himself to the station, and conducted him there under no restraint. This was hardly an assertion of authority such that the reasonable person would consider there was no choice but to obey." J.A. 476.

Thus, petitioner consented to the method of transportation and therefore to the transportation itself.

3. Circumstances Of The Interrogation

Petitioner agreed to an interview at the Pomona police department. When petitioner and the Baldwin Park officers arrived at the station, they entered through the sally port. J.A. 40. This was the only entrance from the police parking lot. J.A. 401. The Baldwin Park police officers asked a local officer where to take petitioner for an interview. J.A. 62. They were directed to an interview room on the ground floor. J.A. 62. The officers escorted petitioner to this room. J.A. 40.

Petitioner argues that he was in custody because the interview room was located in a secured part of the

police station. The fact that a police station also has a jail is not significant or dispositive where, as here, petitioner agreed to an interview in the police station. While the interview room was in close proximity to the jail facilities, petitioner and the officers walked past the booking counter. J.A. 40. The interview room itself was the same configuration as normal interview rooms, containing a table and chairs. J.A. 115. There were no bars or unique characteristics which made the interview room peculiarly intimidating.[17] J.A. 40. In light of petitioner's consent to an interview at the police station, the location of the interview room did not convert the encounter into a custodial interrogation.[18]

Lieutenant Johnston conducted petitioner's interview. Only Lieutenant Johnston and Officer Bell were present for the interview. Petitioner was not handcuffed or physically restrained. J.A. 73. At the beginning of the interview, Johnston advised petitioner that he was investigating the circumstances surrounding

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17. Petitioner emphasizes that one could not leave the interview room without the assistance of a police officer because it locked from the outside. The door only locked if it was pulled closed. J.A. 404. The door was normally left open. J.A. 405. Lieutenant Johnston did not recall if the door was shut during the interview. J.A. 116.

Furthermore, all the interview rooms in the Pomona police station locked when closed. J.A. 405. Nothing would distinguish the ground floor interview room used by the officers here from other police interview rooms. Thus, a reasonable person who agreed to a station house interview would not consider this feature as indicative of custody. Furthermore, petitioner could not have known if it was locked.

18. Petitioner never voiced any objection to the location of the interview room and never attempted to withdraw his consent to the interview. J.A. 62, 75.

the disappearance of a young girl from the Baldwin Park area. J.A. 258. Johnston told petitioner that he was a possible witness. J.A. 248, 258. This statement reiterated Officer Lee's earlier representation that petitioner was only a possible witness. While a reasonable person under the circumstances would not be aware of the particular information uncovered by the police investigation, the police here specifically informed petitioner that they wanted to question him as a *witness*. The officers communicated their subjective belief regarding petitioner's status as a witness. While "a policeman's unarticulated plan has no bearing on the question whether a suspect was in custody at a particular time," *Berkemer v. McCarty*, *supra*, 468 U.S. at 441-42, the police officers' truthful characterization of petitioner as a witness provides fair support for the conclusion that a reasonable man in petitioner's position would have considered himself free to leave. Where, as here, the police officer's perspective is communicated to the interviewee, his subjective intent is relevant to a custodial determination. *See Michigan v. Chesternut*, *supra*, 486 U.S. at 575, n. 7 [police officer's subjective intent "relevant to Fourth Amendment implications of police conduct only to the extent that that intent has been conveyed to the person confronted."]. Treatment of an individual as a witness "cannot fairly be characterized as the functional equivalent of formal arrest." *Berkemer v. McCarty, supra,* 468 U.S. at 442.[19]

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19. Petitioner states that the California court's analysis "implies that the police have no obligation to inform a citizen of his constitutional rights unless the citizen has first challenged the authority of the police and they have overcome his resistance." Brief of Pet. at 26. Petitioner's position would mandate that the police

To this extent, petitioner's contention that the state courts used an invalid criterion to determine custody is highly misleading if not completely fallacious.

This Court has recognized that all police questioning is in some respects coercive, but police officers should not be compelled to admonish all citizens with whom they have contact.

> "Any interview of one suspected of a crime by a police officer will have coercive aspects to it, simply by virtue of the fact that the police officer is part of a law enforcement system which may ultimately cause the suspect to be charged with a crime. But police officers are not required to administer *Miranda* warnings to everyone whom they question. Nor is the requirement of warnings to be imposed simply because the questioning takes place in the station house . . . ." *Oregon v. Mathiason*, *supra*, 429 U.S. at 495.

The extent to which an individual is confronted with evidence of guilt is pertinent to an inquiry regarding custodial status. "The aura of confidence in his guilt undermines his will to resist. He merely confirms the preconceived story the police seek to have him describe . . . ." *Miranda*, 384 U.S. at 455. The vocalization of police confidence in an individual's guilt supports a

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admonish every person with whom they have contact. Certainly, neither *Miranda* nor the Fifth Amendment would be served by this burdensome requirement. This Court has never held that police have a duty to provide legal advice to persons not in custody, *see United States v. Mendenhall*, *supra*; *Schneckloth v. Bustamonte*, *supra*, and should decline to do so now.

reasonable determination that the individual is in custody. "[T]he coercion inherent in custodial interrogation derives in large measure from an interrogator's insinuations that the interrogation will continue until a confession is obtained." *Minnesota v. Murphy*, *supra*, 465 U.S. at 433; *see Berkemer v. McCarty*, *supra*, 468 U.S. at 433.

Here, the form of questioning at the interview was not accusatory. Petitioner's interview was predominantly narrative in form. Lieutenant Johnston merely asked petitioner to describe his activities on the day of the abduction and to relate any information he knew about the victim and other individuals in the area of the abduction. The police did not attempt to obtain a confession but a witness's statement. "[T]here is no indication whatsoever that the agents engaged in the type of 'strong arm tactics,' that would have justified a belief on [petitioner's] part that he was in custody." *United States v. Hocking*, 860 F.2d 769, 773 (7th Cir. 1988); *see United States v. Jones*, 630 F.2d 613, 616 (8th Cir. 1980).

The interview here was brief, lasting only 20 to 30 minutes. Lieutenant Johnston asked only "a modest number of questions."[20] *Berkemer v. McCarty*, *supra*, 468 U.S. at 442. The shorter an encounter, the less intrusive its nature and the less likely that one will consider that the level of restraint was equivalent to a formal arrest. Here, the short duration of the interview supports a determination that the statement was not the product of custodial interrogation. *See Berkemer*, 468 U.S. at 441 [short period of detention not custodial]; *Beheler*, 463 U.S.

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20. Lieutenant Johnston conducted the interview. Officer Bell was only an observer and asked no questions. J.A. 157, 228-29.

at 1122 [30 minute interview in station house not custodial]; *United States v. Hudgens*, *supra*, 798 F.2d at 1237 [45 minute interview at arranged location not custodial].

While the police did not specifically tell petitioner that he was not under arrest, they did tell him that they wanted to speak with him "as a possible witness." J.A. 36. This statement fairly implies that the interview would be limited in duration and that petitioner would be free to leave. The police said nothing to suggest that petitioner was in custody. *See United States v. Wynne*, 993 F.2d 760, 764 (10th Cir. 1993) [absence of statement by police suggesting custody relevant]. At no point in time before his arrest was petitioner informed that the interview would not be temporary. *Berkemer*, 468 U.S. at 441. The police gave petitioner no reason to believe that the interview "would be other than temporary." *United States v. Bengivenga*, 845 F.2d 593, 600 (5th Cir. 1988)(en banc); *see United States v. Phillips*, 812 F.2d 1355, 1362 (11th Cir. 1987)(per curiam) [defendant never told was under arrest.]

To summarize, petitioner voluntarily agreed to an interview at the police station and accepted the offer of transportation by the police. Once at the station, he went to an interview room where the homicide investigator told him that he was a potential witness to a child's abduction. This one investigator conducted a nonconfrontational 20 to 30 minute interview. Petitioner never asked to terminate the interview or to leave. Petitioner was never told that the interview would not be temporary.

Judged by the information available to petitioner

at the time of his interview, a reasonable person under the circumstances would not have considered the interview a custodial interrogation. Neither should this Court.

CONCLUSION[21]

Accordingly, for the reasons stated, respondent respectfully requests that the judgment of the California Supreme Court be affirmed.

DATED: January 13, 1994

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21. Petitioner suggests that this Court defer ruling on this case because he was convicted under the California 1978 death penalty statute, the constitutionality of which is challenged in *Tuilaepa v. California*, 93-5131, and *Procter v. California*, 93-5161. Brief of Pet. at 2, n. 1. The issue upon which petitioner now seeks relief is outside the scope of this Court's grant of certiorari. Thus, this Court should decline petitioner's request to defer a decision in this case.